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No. 93-1256

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CITY OF LADUE, *et al.*,
Petitioners,
v.
MARGARET GILLEO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICI CURIAE* OF AMERICAN ADVERTISING FEDERATION, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, MAGAZINE PUBLISHERS OF AMERICA, AND THE MEDIA INSTITUTE IN SUPPORT OF RESPONDENT

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IN THE
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BRIEF *AMICI CURIAE* OF AMERICAN ADVERTISING FEDERATION, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, MAGAZINE PUBLISHERS OF AMERICA, AND THE MEDIA INSTITUTE IN SUPPORT OF RESPONDENT

The City of Ladue's sign ordinance impermissibly discriminates in favor of certain messages and speakers over other protected communications and is unconstitutional under the First and Fourteenth Amendments to the Constitution of the United States. The decision of the United States Court of Appeals for the Eighth Circuit invalidating the ban should be affirmed.[1]

INTEREST OF *AMICI CURIAE*

Amici represent thousands of advertising agencies, advertisers, broadcasters, publishers, and others who participate in the advertising industry nationwide, as well as

[1] Both parties have consented to the participation of *amici* in this case pursuant to Supreme Court Rule 37, as evidenced in letters filed with the Court.

individuals interested in preserving freedom of speech. It is from this broad-based, national perspective that the *amici* present their views to the Court. They have joined in this brief to ensure that the right to disseminate, and the public's right to receive, truthful commercial speech about lawful products and services is protected. *Amici,* who are described below, are:

- The American Advertising Federation ("AAF") is a national trade association representing virtually all elements of the advertising industry. Among AAF's members are companies that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations, and other media. AAF members also include 21 national trade associations; more than 200 local professional advertising associations with 52,000 members; and more than 200 college chapters, with more than 6,000 student members. AAF members use almost all forms of media to advertise and communicate with consumers throughout the United States.
- The American Association of Advertising Agencies ("AAAA"), the national trade association of the advertising agency industry, represents approximately 650 advertising agencies located throughout the United States. Members of the AAAA create and place approximately 80 percent of all national advertisements, as well as significant portions of local and regional advertising. Most clients of AAAA members are businesses selling goods or services to the public. AAAA is dedicated to advancing the interests of the advertising industry and has actively represented its members in connection with governmental efforts to restrict speech.
- The Magazine Publishers of America ("MPA"), the industry association for consumer magazines, has since 1919 represented the interests of magazines distributed in the United States and issued

at least quarterly. MPA's roster includes 205 publishers who produce more than 738 magazines, plus 74 associate members, and 58 international publishing members.

- The Media Institute (the "Institute") is an independent, non-profit research organization that advocates a strong First Amendment. The Institute has participated in select cases in federal circuit courts and the U.S. Supreme Court. In addition, it conducts research projects and sponsors publications relating to the First Amendment and other aspects of the communications media. The advocacy of the Institute here is unrelated to the financial or proprietary interests of any private-party participant.

SUMMARY OF ARGUMENT

The City of Ladue's sign ordinance is unconstitutional not because it "favor[s] commercial speech over noncommercial speech," *Gilleo v. City of Ladue,* 986 F.2d 1180, 1184 (8th Cir.), *cert. granted,* 114 S. Ct. 55 (1993), but because it is overtly content-based and unjustifiably favors certain messages by specified speakers over other constitutionally protected communications. Ladue's attempt to characterize Chapter 35 of its city ordinances (hereinafter "the ordinance") as "content-neutral" on the grounds that it is "justified without reference to the content" of the restricted speech must be rejected because: (1) this Court's caselaw makes clear that the so-called "secondary effects" rationale does not excuse a severe limitation on fully protected speech; (2) the "secondary effects" of the signs prohibited by the City are no more harmful than the effects of the signs the City permits; and (3) the effect of an ordinance, and not the reasons used to explain it, should determine whether strict scrutiny is appropriate. Only such an "objective" approach can avoid inquiries into the legislative motivation and legislative history that would be necessary to gauge the government's true intentions when adopting a measure that limits speech. In any event, whether assessed under strict

or immediate scrutiny, Ladue's ordinance fails because the City could have easily accomplished its objectives by adopting numerous less restrictive regulations.

Ladue's ordinance recognized that commercial activity within its borders necessitated certain commercial messages. It also sought to accommodate the rule of *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977), which prohibits limitations on for-sale signs. In the process, the City has run headlong into the Court's commercial speech doctrine, which accords commercial speech a lower level of constitutional protection than noncommercial speech. That doctrine can be construed—as the lower courts here held—to render constitutionally problematic any ordinance that seeks to place commercial messages on a different or equal (but not clearly lower) plane. Such an outcome hamstrings municipalities. The Court can escape these difficulties by making clear that commercial speech and noncommercial speech should be accorded the same measure of constitutional protection. Such a rule would be consistent with the original understanding of the First Amendment, which extended to commercial speech as well as core political speech, and the results of this Court's caselaw. It would also avoid having government officials make the delicate and content-based judgments needed to define the limits of commercial and noncommercial messages. Most importantly, equalizing the level of protection of commercial and noncommercial speech would enable cities to adopt sign ordinances that balance the rights of commercial and noncommercial speakers, as well as the interests of the government in avoiding visual blight.

ARGUMENT

I. THE CITY'S CONTENT-BASED ORDINANCE CANNOT WITHSTAND STRICT SCRUTINY.

The ordinance at issue in this case is unquestionably content-based in its effect. Although it authorizes "for sale" or "for lease" signs on residential property, it otherwise prohibits residents from displaying all but small identification signs on their property. In contrast, churches,

schools, and commercial establishments, among others, are permitted to erect signs that inform the public about the activities on their premises. Even these organizations, however, are prohibited from displaying signs dealing with other topics. Furthermore, Ladue dictates in considerable detail what may and may not be said on the signs it does allow. Such an obviously content-based ordinance is unconstitutional unless it serves a compelling state interest by the least restrictive means and leaves open alternative channels of communication.

Ladue defends its ordinance as content-neutral because it is said to be "justified without reference to the content" of the signs. This rationale is inapplicable where, as here, the government discriminates against some fully protected communications in favor of other such messages. It is also irrelevant to this case because the signs banned by the City would cause no more "visual blight" than the signs that are allowed. Most important, however, this Court should make clear that the effect of a law, and not the legislature's intentions in adopting it, determines whether a law is content-based and therefore subject to strict scrutiny.

A. The City of Ladue's Ordinance is Overtly Content-Based.

Unless they serve a compelling state interest, regulations of speech based on content are prohibited. *See, e.g., Burson v. Freeman,* 112 S. Ct. 1846, 1855 (1992) (plurality opinion) ("[D]istinguishing among types of speech requires that the statute be subjected to strict scrutiny."). The City's ban on all signs, subject to some exceptions, is content-based for at least two reasons. First, it excepts certain messages by selected speakers, thus creating distinctions on the basis of subject matter. Second, the ordinance dictates the content of specified permitted signs. Thus, "by any commonsense understanding of the term, the [ordinance] in this case is 'content-based.'" *City of Cincinnati v. Discovery Network, Inc.,* 113 S. Ct. 1505, 1516-17 (1993).

1. *The exceptions to the bar on signs discriminate based on the speaker and message.*

Like the statute invalidated in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978), Ladue's ordinance regulates "the subjects about which persons may speak and the speakers who may address a public issue." The ordinance does so by excepting from the ban not only traffic and safety-related signs, but also (1) signs identifying residences and subdivisions; (2) identification signs and bulletin board-type signs for churches, religious institutions, schools, and other not-for-profit institutions; (3) real estate rental or for-sale signs; and (4) specified signs on commercial establishments. City of Ladue Petition for Certiorari App. 40a-45a. These distinctions are content-based in that they, for example, permit a resident to post a for-sale sign in front of her house but not a sign that says "Peace in the Gulf" or "Welcome Home, Joe." They amount to a choice by the City as to the "appropriate subjects for public discourse." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514 (1981). As such, they warrant strict scrutiny. *Id.*

The City's ordinance should also be subject to strict scrutiny because it favors certain messages communicated by particular speakers over the speech of others. Permitting religious institutions and commercial establishments to post information about their activities while denying that same right to Ladue residents is plainly problematic. *Minneapolis Star of Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) ("[D]ifferential treatment . . . suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.").[2] Absent a compelling reason, the government may not determine that a church's notice of its presence and the time of its worship services is more valuable "speech" than an

[2] *See also, e.g., Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991) ("The Government's power to impose content-based [burdens] on speech surely does not vary with the identity of the speaker.").

individual's views about the Gulf War. Allowing the former and prohibiting the latter is unquestionably content-based.

2. *The ordinance dictates the content of the signs it does permit.*

This Court has often said that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). Ladue's ordinance does precisely that. The signs tolerated by the City are not limited to those needed for identification, health, or safety. Ladue allows churches and schools to erect bulletin board-type signs and commercial establishments to place message-bearing signs[3] in their windows. However, the City then seeks to control what those entities may say on such signs. Section 35-5 limits church "bulletin boards" "to announcements relating to the name of such church, . . . *its services, activities, or other functions.*" Ladue Pet. Cert. App. 41a (emphasis added). Signs in the windows of commercial establishments may inform the public about activities conducted on the premises. Brief of Petitioner at 28; Ladue Pet. Cert. App. 38a, 42-43a (quoting Sections 35-1, 35-7). Thus, a church's bulletin board may say "Church Bazaar Sunday," but it may not state "Free South Africa" or proclaim that "The Bible Values Life: Don't Drink and Drive." A sign in a commercial establishment may say "Clearance Sale," but may not say "Save Our Jobs: No On NAFTA." Whatever else may be said about such distinctions, they are undeniably content-based.[4]

[3] By "message-bearing signs," *amici* are referring to signs—either commercial or noncommercial—used for purposes other than identification.

[4] Similarly, the Ladue ordinance dictates the contents of for-sale and for-lease signs. Section 35-10 provides that such signs "may only state: (a) that the property is for sale, lease or exchange by the owner or his agent; (b) the owner's or agent's name; and (c) the owner's or agent's address or telephone number." Ladue Pet. Cert. App. 45a. Adding the phrase "Eager to Sell" would, thus, presumably render the signs impermissible.

Once the City has made a determination to allow a church to erect a bulletin board or a resident to post a for-sale type sign of designated sizes, it may not dictate the contents of those signs. For Ladue to ensure that its rules have been complied with, "enforcement authorities must necessarily examine the content of the message that is conveyed." *Arkansas Writers' Project v. Ragland,* 481 U.S. 221, 230 (1987) (quoting *FCC v. League of Women Voters,* 468 U.S. 364, 383 (1984)). But such "official scrutiny of the content of [a message]" is "entirely incompatible with" First Amendment guarantees. *Arkansas Writers,* 481 U.S. at 230.

Under any definition of the term, the City's ordinance is "content-based." Accordingly, strict scrutiny is warranted.

B. The City of Ladue Cannot Evade the Content-Based Nature of the Ordinance By Contending That It is "Justified Without Reference to the Content" of the Restricted Speech

Ladue does not defend its ordinance as content-neutral in effect. Nor could it. Instead, it seeks refuge in this Court's occasional suggestion that certain laws should be treated as content-based if the justifications advanced for them are not tied to the subject matter or viewpoint of the restricted speech. This argument fails for three reasons. First, this Court has never employed the so-called "secondary effects" rationale [5] to uphold a restriction that favored one fully protected message over another equally protected message. Second, as this Court made clear in *Discovery Network,* 113 S. Ct. at 1514-15, a regulation may not turn on content where the effects associated with the speech are irrelevant to the message. Put another way, a for-sale sign and a political sign of like size both arguably create "visual blight." Distinguishing between

[5] *Amici* follow the practice of the Court in *R.A.V. v. City of St. Paul,* 112 S. Ct. 2538, 2546 (1992), and refer herein to the notion that an ordinance is content-neutral if it is "justified without reference to the content" of the restricted speech as the "secondary effects" rationale.

the two is a suspect content-based distinction. Finally, this Court should make clear that the operation of a regulation, not the purported justification for it, determines the level of scrutiny accorded a restriction on communication.

1. The "secondary effects" rationale is inapplicable here.

Ladue's entire argument depends on its contention that this overtly content-based ordinance is content-neutral because it is "justified without reference to the content" of the messages contained on the signs. *See, e.g.,* Pet. Brief at 34-35. Its contention fails because the "secondary effects" rationale is inapplicable here. That rationale may be "a valid basis for according differential treatment to . . . a content-defined *subclass of proscribable* speech." *R.A.V.*, 112 S. Ct. at 2546 (emphasis added). This case, however, does not involve such "proscribable speech." As the *R.A.V.* court recognized, "the prohibition against content discrimination . . . applies differently in the context of proscribable speech than in the area of fully protected speech," *id.* at 2545, which is at issue here.

The City's ordinance makes illegitimate distinctions between categories of fully protected speech. It permits notices of church activities but forbids Ms. Gilleo from expressing her political opinions—or a notice of an Alcoholics Anonymous meeting at her house. A for-sale sign is allowed if its contents strictly conform with the ordinance, but not if it adds a word or a phrase. Such content-based distinctions are prohibited absent a compelling justification because this type of discrimination "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace," *Simon & Schuster,* 112 S. Ct. at 508, if only because severe restrictions on communication inevitably reinforce the status quo.[6]

[6] In addition, the "secondary effects" the Ladue ordinance seeks to avoid are not the type the Court has relied on in lowering the scrutiny of restrictions on speech. As the Court made clear in *Boos v. Barry,* 485 U.S. 312, 321 (1988), "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in

Thus, under this Court's caselaw, the "secondary effects" rationale cannot be employed to lessen the level of scrutiny accorded this manifestly content-based ordinance.

2. *A regulation cannot be justified as preventing "secondary effects" where the permitted communications create the same effects as those that are barred.*

In *Discovery Network*, 113 S. Ct. at 1511, the City of Cincinnati contended that its bar on the distribution of commercial newspapers via newsracks was justified by its interests in "safety and esthetics." "[B]ecause every decrease in the number of such dispensing devices necessarily effects an increase in the safety and improvement of the cityscape," the City maintained that its prohibition was "*entirely* related to its legitimate interests in safety and esthetics." *Id.* This Court rejected the City's claim, believing it "an insufficient justification for the discrimination against respondents' use of newsracks *that are no more harmful than the permitted newsracks.*" *Id.* (emphasis added).

Similarly, as the Eighth Circuit found, "Ladue has not shown that the prohibited signs cause more aesthetic, safety, and property value problems than the permitted signs." 986 F.2d at 1183. To illustrate, the esthetic effect on the City of Ladue is the same whether a sign in front of the church declares "Jesus Saves" or "Bazaar Next Saturday." The City's discrimination in favor of certain signs and messages thus "does not correlate with Ladue's interest in eliminating the secondary effects" it purportedly fears. *Id.* This "undermines Ladue's commitment to its secondary-effects justification and supports the contention that the ordinance is aimed at the content of the signs." *Id.*

Renton." Here, the only "secondary effect" of the speech about which the City of Ladue is concerned is the emotional state of those who see the signs and are, presumably, less happy because of the "visual blight" they are forced to endure. *Id.* The psychological effect of a sign is a far cry from the increase in crime, prostitution, decrease in property values, destruction of residential neighborhoods, and the other "secondary effects" identified in cases like *Renton v. Playtimes Theaters, Inc.*, 475 U.S. 41 (1986), and *Barnes v. Glen Theater, Inc.*, 111 S. Ct. 2456 (1991).

As was the case in *Carey v. Brown*, 447 U.S. 457, 465 (1980), nothing in the content-based distinctions drawn by the City "has any bearing whatsoever on" visual blight. *See also Discovery Network*, 113 S. Ct. at 1514 ("[T]he distinction bears no relationship *whatsoever* to the particular interests that the City has asserted."); *cf. Simon & Schuster*, 112 S. Ct. at 510. Although Petitioners strain mightily to characterize certain signs as prone to proliferation, this is simply a pretext for permitting signs the City deems vital and restricting those it considers unimportant. This Court has repeatedly held that regulations that rely unnecessarily on content-based destinctions must be closely scrutinized. Accordingly, strict scrutiny is appropriate here.[7]

3. *Assessing regulations on speech objectively would avoid inappropriate inquiries into legislative motives.*

Petitioners' contention that the intentions of lawmakers should define the level of scrutiny invites difficult inquiries into legislative motivation and legislative history. The Court should reject this invitation and make clear that the actual effect of a regulation determines whether it is content-based—not the justifications advanced for it.

The City in effect contends that, absent a demonstrably evil intention on its part, any restriction it imposes on speech, no matter how severe, must be tested against the more deferential standard applied to content-neutral restrictions. Taken to its logical conclusion, the City's argument would "undermine the very foundation of the

[7] Nor can the City of Ladue defend the ordinance as content-neutral merely because it is arguably not viewpoint-based. *See, e.g., Boos*, 485 U.S. at 318-319 (finding that a statute was content-based, but not viewpoint-based); *Burson*, 112 S. Ct. at 1850 ("This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic.").

content-based/content-neutral distinction." Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 116-17 (1987). It would all but eliminate strict scrutiny for restrictions on speech, as legislatures concoct multiple "content-neutral" reasons to mask their true agendas.

Acceptance of the City's argument would essentially force putative speakers to show that the legislature subjectively intended to censor speech. Yet this Court has "consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" *Simon & Schuster*, 112 S. Ct. at 509 (quoting *Minneapolis Star*, 460 U.S. at 592). To prevail, Ms. Gilleo should not be forced to show "evidence of an improper censorial motive." *Arkansas Writers*, 481 U.S. at 228.

Adopting the City's position would have dire implications for free speech. Where legislators set forth content-neutral reasons for content-based restrictions on speech, as Ladue seeks to do here, the only way for the courts to police against government attempts to disguise such limits as content-neutral would be to examine the subjective motivations of the legislators, an enterprise this Court has eschewed in a variety of other contexts.[8] As Justice Scalia recently observed, "[w]e are governed by laws, not by the intentions of legislators." *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1567 (1993) (Scalia, J., concurring).

To illustrate, assume that an unpopular municipal administration is the subject of numerous newspaper attacks. In an attempt to diminish the circulation of these hostile newspapers, the city council bars the distribution

[8] *See, e.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810) ("It may well be doubted, how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice."); *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment.").

via newsracks of newspapers that address municipal issues. The council contends that such newspapers are more popular than others, which leads to a greater number of unattractive newsracks and an increased likelihood of litter. This justification is set forth in the statute, together with statistics demonstrating that newspapers addressing municipal issues are in fact more popular and therefore give rise to a large percentage of the city's litter. Would such a regulation be constitutional? If so, the government will almost always be able to achieve its censorial ends by designing a class that includes the speakers it is seeking to shut down, and manufacturing content-neutral justifications for its classification. How would the Court guard against such a tactic, other than by examining the subjective intentions of the legislators? Yet this Court has properly recognized that "determining the subjective intent of legislators is a perilous enterprise." *Edwards v. Aguillard*, 482 U.S. 578, 638 (1987) (Scalia, J., dissenting); *see supra* note 8.

Legislation is often "the product of multiple and somewhat inconsistent purposes that led to certain compromises." *United States R.R. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring). Certainly the subjective motivation of legislators may not be divined without extensive reliance on legislative history. *See Edwards*, 482 U.S. at 636 (Scalia J., dissenting) (describing the difficulties of such an analysis). In addition, "undue emphasis on actual motivation may result in identically worded statutes being held valid in one State and invalid in a neighboring State." *Fritz*, 449 U.S. at 180.

Subjecting all regulations that turn on content-based distinctions to strict scrutiny has the advantage of avoiding any inquiry into legislative purpose, objective or subjective. Such an approach recognizes that "the best protection against governmental attempts to squelch opposition has never lain in [the Court's] ability to assess the purity of legislative motive but rather in the requirement that the government act through content-neutral means that restrict expression the government favors as well as

expression it disfavors." *Boos,* 485 U.S. at 336-337 (Brennan, J., concurring).[9]

"[E]ven regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star*, 460 U.S. at 592. Expressly content-based restrictions—whatever their justification—distort public debate in a content-differential manner and pose an especially high risk of improper motivation. Stone, *supra,* at 116. Particularly when dealing with high-value speech, this Court ought to examine the operation of a restriction on speech instead of the justifications advanced therefor. Under that test, Ladue's ordinance is unquestionably subject to strict scrutiny.[10]

C. The City's Ordinance Cannot Survive Strict Scrutiny.

"Content-based regulations are presumptively invalid." *R.A.V.*, 112 S. Ct. at 2542. A content-based regulation can only survive if the government "show[s] that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'" *Simon & Schuster, Inc.*, 112 S. Ct. at 509 (quoting *Arkansas Writers,* 481 U.S. at 231). A law that is subject to strict

[9] *See also Burson,* 112 S. Ct. at 1858-59 (Kennedy, J., concurring) ("Discerning the justification for a restriction of expression is not always . . . straightforward . . . . In some cases, a censorial justification will not be apparent from the face of a regulation which draws distinctions based on content, and the government will tender a plausible justification unrelated to the suppression of speech or ideas.").

[10] At a minimum, the Court should clarify that the objective purpose of a statute is controlling, not the subjective motivations of the legislators or the post hoc rationalizations of government litigators. "For while it is possible to discern the objective 'purpose' of a statute (*i.e.*, the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth . . . , discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task." *Edwards*, 482 U.S. at 636 (Scalia, J., dissenting).

scrutiny "rarely survives such scrutiny." *Burson,* 112 S. Ct. at 1852.

In this case, although the City's interest in combatting visual blight may be substantial, it is far from compelling. This case is not like *Burson,* where the Court was presented with the "particularly difficult reconciliation" of balancing "the accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy." *Id.* at 1851. Unlike the right to vote, there is no constitutional right to live in a totally sign-free neighborhood. The ordinance therefore does not vindicate a "compelling interest."

On the other hand, there is a constitutional right to speak. At least two free speech interests are at issue here —that of the homeowner and those of the readers. The right to use one's property for communicative purposes lies at the heart of the First Amendment. A homeowner's interest in communicating a message from his or her own property is a deeply felt and vital one, for which there are few substitutes. *See City Council of City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 811 (1984) (recognizing "[t]he private citizen's interest in controlling the use of his own property"). In fact, this Court has often held that the government may not compel property owners to devote their property to messages with which they disagree.[11]

Moreover, the interests of recipients of the information are also substantial, particularly with respect to for-sale signs. *Linmark,* 431 U.S. 85.[12] Although the interests of

[11] *Miami Herald v. Tornillo,* 418 U.S. 241 (1974) (publisher has right to use its own newspaper space as it sees fit); *Wooley v. Maynard,* 430 U.S. 705, 715 (1977) (citizens may not be required to "use their private property as . . . a 'mobile billboard' for the State's ideological message").

[12] *See also Kleindeinst v. Mandel,* 408 U.S. 753, 762-63 (1977) (recognizing the right to "receive information and ideas"); *Lamont v. Postmaster General,* 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("[T]he right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if

the homeowner and the listener do not completely override all other interests, the government's interests in esthetics is not compelling when measured against the First Amendment interests in disseminating and receiving speech.

The City has also utterly failed to demonstrate the existence of any problem that would necessitate the regulation. "[T]he danger of censorship presented by a facially content-based statute requires that that weapon be employed only where it is *necessary* to serve the asserted compelling interest." *R.A.V.*, 112 S. Ct. at 2549 (internal quotation marks, citations, and brackets omitted) (emphasis in original). Certainly Ms. Gilleo's small, single sign does not present a serious threat to the beauty of Ladue. Moreover, as this Court noted in *Vincent*, "private property owners' esthetic concerns will keep the posting of signs on their property within reasonable bounds." 466 U.S. at 811.[13] Because the City could plainly have promoted its interests through other, less restrictive means than a total ban on signs, its ordinance is unconstitutional.

In addition, the numerous, less-restrictive content-neutral alternatives available to the City that still would accomplish its goal would cause this restriction to fail even intermediate scrutiny. *See Discovery Network*, 113 S. Ct. at 1510 n.13 ("[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between the ends and means is reasonable.").[14] As such, it is unquestionably unconstitutional under strict scrutiny.

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otherwise willing addresses are not free to receive and consider them.").

[13] Although the City argues that the aggregate effect of signs displayed in homeowners' windows would create "visual blight," it fails to show that most or even many homeowners would place signs in their windows or on their lawns.

[14] For example, a rule limiting the number and size of signs per home or establishment would be permissibly content-neutral. A

Finally, the restriction does not leave open "ample alternative channels for communication." *Linmark*, 431 U.S. at 93. As noted, the ability to communicate a message from one's own property is a vital one. There is no substitute for an on-site sign to identify a commercial establishment, a house for sale, or the activities of a church.[15] Nor were there many practical alternatives for Ms. Gilleo's message.[16]

In sum, the Ladue ordinance fails to meet any part of the strict scrutiny test applicable to content-based regulations. Accordingly, it should be invalidated as unconstitutional.

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first-come, first-served restriction limiting the total number of signs permissible in any subdivision could also satisfy the City's esthetic concerns without a content-based restriction. Similarly, limiting the amount of time a sign could be displayed might limit the proliferation of signs. *See* Opposition of Respondent to Petition for Certiorari at 9.

[15] *See Metromedia*, 453 U.S. at 516 (" 'Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate, and prohibitively expensive.' " (quoting Joint Stipulation of Facts)); *Linmark*, 431 U.S. at 93 (media other than signs "may be less effective . . . for communicating the message that is conveyed . . . . The alternatives, then, are far from satisfactory.").

[16] Indeed, the ordinance's bar on all signs amounts to a complete proscription on a mode of communication. Such bans pose significant dangers to the freedom of speech. "[S]omething is lost in transition" when a speaker is denied the ability to speak in his or her preferred medium. Stone, *supra*, at 65. Certain means of communication may be "used disproportionately by certain types of speakers or by speakers associated with particular points of view." *Id.* at 66. Foreclosing that mode can harm the proponents of one viewpoint over others. Moreover, a sign is an inexpensive and easy mode of communication. Were Ms. Gilleo required to purchase time on a radio or television station or an ad in a newspaper to express her views, she might well stay silent.

II. TRUTHFUL MESSAGES ABOUT LAWFUL PRODUCTS AND SERVICES SHOULD BE ACCORDED FULL FIRST AMENDMENT PROTECTION.

Ladue excepted certain commercial communications from its ban because it recognized that a total ban on commercial signs would essentially exile from within its borders all entities offering goods or services for sale to the public. Commercial activity is basically impossible if a seller is unable to advertise on-site, at a minimum, its presence and what is offered on the premises. Yielding to this fact of life, the City made the eminently reasonable determination that all commercial signs could not be banned. Arguably, this judgment was constitutionally compelled by this Court's decision in *Linmark,* at least with respect to for-sale and for-lease signs.

Yet, so long as the Court adheres to its rule that commercial speech should be accorded a lower level of constitutional protection than noncommercial speech, any determination by a city seeking to restrict residential signs while preserving commercial activity will inevitably—and apparently impermissibly—"favor[] commercial speech over noncommercial speech." 986 F.2d at 1184. The only way to accommodate fully the compelling needs of municipalities for commercial activity, and of commercial actors to advertise, is for the law to treat commercial speech and noncommercial speech equally.

To be clear, *amici* do not suggest that commercial speech in general is somehow more important, or deserving of more protection, than political speech—which lies at the heart of the First Amendment. *Amici* maintain, however, that there are occasionally compelling needs for commercial messages, and that fully accommodating those interests may be doctrinally feasible only if commercial and noncommercial speech are accorded the same constitutional protections. If commercial messages continue to be considered "lower value" speech, then any attempt by the government to allow commercial speech where noncommercial speech is restricted will almost inevitably be considered unconstitutional. A rule according commercial and noncommercial messages equal treatment would avoid the numerous other doctrinal difficulties created by the Court's current commercial speech jurisprudence and be consistent with the original understanding of the First Amendment, as well as the results of most of this Court's cases.

A. According Full Constitutional Protection to Truthful Commercial Speech Would Avoid the Otherwise Inevitable Dilemmas Created by Municipal Regulation of Signs.

As this case illustrates, according diminished constitutional protection to commercial speech creates severe doctrinal difficulties. Only by treating commercial and noncommercial communications equally can this Court avoid such problems, enable municipal governments to enact reasonable limits on signs, and still protect the constitutional rights of speakers and listeners alike.

A municipality that contains within it both commercial and residential areas has five basic alternatives in seeking to restrict signs. It can: (1) prohibit all signs, (2) allow all signs without restriction, (3) favor noncommercial signs over commercial signs, (4) favor commercial signs over noncommercial signs, or (5) allow equal access to commercial as well as noncommercial signs. Each of these alternatives, except the last, is either impractical or constitutionally problematic. Accordingly, this Court should make clear that, absent compelling reasons for differential treatment, commercial and noncommercial signs should be treated alike.

1. *Barring all signs.* Barring all signs is impossible as a practical and, arguably, as a legal matter. At a minimum, traffic signs are necessary. Other signs, such as public safety signs and hospital identification signs, serve compelling state interests. In addition, as noted, certain commercial signs must be tolerated if a city wishes to have commercial activity within its environs. This Court has recognized that advertising signs serve vital interests, *See Linmark,* 431 U.S. 85,

2. *No limit on signs.* Conversely, preventing municipalities from placing any limits on the signs that may be displayed on one's own property may well accord insufficient leeway to a municipality concerned about "visual blight."

3. *Favoring noncommercial signs over commercial ones.* Permitting a municipality to bar all commercial signs, for example, but requiring it to allow noncommercial signs forces government officials to make difficult and dangerous content-based determinations as to what is and is not commercial. *Discovery Network*, 113 S. Ct. at 1514 n.19 ("[T]he responsibility for distinguishing between [commercial and noncommercial speech] carries with it the potential for invidious discrimination of disfavored subjects."). Such an outcome would also accord insufficient respect to the needs of commercial speakers to communicate, and of listeners to receive, valuable information. And an ordinance of this type might well be inconsistent with the rule of *Linmark*. Finally, as noted above, commercial signs are frequently necessary to the existence of commercial activity.

4. *Favoring commercial signs over noncommercial ones.* As the Eighth Circuit recognized, under current doctrine, this option is constitutionally problematic because it elevates so-called "lower value" speech over "higher value" messages. *See, e.g., Metromedia*, 453 U.S. at 513 ("[T]he city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages."). Moreover, it requires delicate content-based judgments that are inappropriate for government officials. *Discovery Network*, 113 S. Ct. at 1513 and n.19.

On occasion, however, it may be that a governmental entity can adduce compelling reasons for permitting commercial signs but not noncommercial ones, or for allowing institutions, but not residences, to display on-site

signs.[17] This should be permissible, but such a result would be doctrinally problematic unless this Court were to determine that commercial and noncommercial speech should be treated equally. Failure by the Court to adopt such a rule would, thus, undermine every attempt by a municipality to accommodate the needs of commercial speakers and to limit signs to the extent possible. Adherence to a lower level of protection for commercial speech would also continue to make it difficult for the government to permit institutions that need to comunicate with the public to fulfill their functions—such as hospitals, churches, non-profit institutions, and commercial establishments—to have on-site signs and at the same time prevent residences from displaying signs as well. If the Court fails to equalize the treatment of commercial and noncommercial speech, ordinances of this type will almost inevitably be struck down by lower courts on the grounds that they "favor[] commercial speech over noncommercial speech." 986 F.2d at 1184.

5. *According equal treatment to commercial and noncommercial signs. Amici* urge the Court to adopt a rule of equal treatment for commercial and noncommercial speech. Such a rule would preserve this Court's decision in *Linmark*, avoid elevating commercial over noncommercial speech, accommodate the interests of commercial and noncommercial speakers, and permit the City a great deal of control over "visual blight." This rule thus permits reconsideration of potential doctrinal difficulties. As demonstrated below, it is also consistent with the original understanding of the First Amendment, the outcome of most of this Court's cases, and common sense.

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[17] To illustrate, the historic city of Charleston, South Carolina might well determine that stores need signs in order to attract customers, but could demonstrate a compelling interest in barring all residential signs. *Cf. Metromedia*, 453 U.S. at 534 (Brennan, J., concurring); *see supra* pp. 18-19.

B. The Original Understanding of the First Amendment Was That Truthful Commercial Messages Are Fully Protected.

The generation of the Framers accorded property rights the same status as other liberties.[18] The Framers accepted the vital importance of freedom of expression and its inextricable link with property rights, which Cato had articulated as follows: "This sacred Privilege is so essential to free Government that the Security of Property, and the Freedom of Speech, always go together." John Trenchard & Thomas Gordon, 1 *Cato's Letters* 95-103 (1733) (Essay No. 15, Of Freedom of Speech: That the Same is Inseparable From Publick Liberty (Feb. 4, 1720)).[19] Given their outlook, the current distinction between so-called "commercial speech" and speech about other matters would never have occurred to the Framers. Their practical concern for business and property was mirrored in the vibrant colonial press. The standard colonial newspaper was almost half-filled with local advertising.[20] Interest in advertising was intense,[21] and, for

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[18] For example, George Mason's Virginia Declaration of Rights stated that the purpose of the Revolution was to secure "the Enjoyment of Life and Liberty, *with the Means of acquiring and possessing Property*, and pursuing Happiness and Safety." Va. Declaration of Rights, art. 1 *reprinted in* Helen H. Miller, *George Mason: Gentleman Revolutionary* 340 (1975) (emphasis added). As James Madison put it, "[w]here an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions." James Madison, Papers, March 29, 1792, *reprinted in* 1 *The Founders' Constitution* 598 (Philip B. Kurland & Ralph Lerner eds., 1987).

[19] Cato's articulation of the tie between property rights and free speech was enormously influential in colonial America. Jeffery A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 25 (1988).

[20] Lawrence C. Wroth, *The Colonial Printer* 234 (1938). To illustrate, in 1766, Hugh Gaine's *New York Mercury* was seventy percent advertising, and fifty-five percent of the *Royal Gazette* was commercial matter. Alfred M. Lee, *The Daily Newspaper in America* 32 (1937).

[21] During the colonial era, "[a]dvertisements had as much interest as the news columns, perhaps greater interest . . . . Arrival of a new cargo . . . likely was what the man, home from a reading at the coffee house or tavern, talked about at his fireside rather than the reception of a new envoy at some court in Europe." Frank Presbrey, *The History and Development of Advertising* 154 (1929). *See also Discovery Network*, 113 S. Ct. at 1512-13 n.17 (quoting Revolutionary-era printer Isaiah Thomas).

much of that era, newspapers did not differentiate commercial and editorial material by layout or typeface.[22]

The full integration of editorial and commercial matters in the press reflected the colonial view that the benefits of freedom of expression extended to the entire spectrum of human endeavors. Thus, the Continental Congress urged settlers in Quebec to recognize that a free press was crucial to "the advancement of truth, science, morality, and arts in general." Address to the Inhabitants of Quebec (1774), *reprinted in* Bernard Schwartz, 1 *The Bill of Rights: A Documentary History* 223 (1971). This view encompassed commercial communications as well. For example, Richard Henry Lee of Virginia—perhaps the leading Anti-Federalist—said in his demand for a bill of rights that "a free press is the channel of communication to *mercantile* and public affairs."[23]

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[22] Kent R. Middleton, *Commercial Speech in the Eighteenth Century, printed in Newsletters to Newspapers: Eighteenth-Century Journalism* 281 (Donovan H. Bond & W. Reynolds McLeod eds., 1977).

[23] Letter XVI, January 20, 1788, in *An Additional Number of Letters from the Federal Farmer to the Republican* 151-53 (1962) (emphasis added), *reprinted in Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories* 144 (Leonard Levy ed., 1966). The twin concepts of freedom of speech and of the press were considered as two sides of the same coin, serving the same purposes, and were often referred to interchangeably. *See, e.g.*, Leonard Levy, *Legacy of Suppression* 174 (1960) ("[F]reedom of speech and freedom of the press, being subject to the same restraints of subsequent punishment were rarely distinguished. Most writers, including Addison, Cato, and Alexander, who employed the term 'freedom of speech' with great frequency, used it synonymously with freedom of the press."). Thus, this Court has always treated the freedom of speech and press as coterminous. *See, e.g., Bellotti*, 435 U.S. at 781-83.

Given the prevalence and importance of commercial messages in colonial America, it is not surprising that the very idea of "the freedom of speech, or of the press" evolved in close connection with the development of advertising. In fact, one of the best-known statements in defense of the freedom of expression was written in response to an attack on a commercial message printed by Benjamin Franklin. In 1731, Franklin printed an advertising handbill for a ship's captain, who sought additional freight and passengers for his ship. At the bottom of the ad was the note, "No Sea Hens nor Black Gowns will be admitted on any Terms." *An Apology for Printers,* Pa. Gazette, June 10, 1731, *reprinted in* 2 *Writings of Benjamin Franklin* 172, 176 (1907).

This handbill prompted criticism from the local clergy (the "Black Gowns"), although it is unclear whether they were more offended by their exclusion from the pool of desirable passengers or from their placement in the same category as women of ill repute ("Sea Hens"). In response, Franklin published his *Apology for Printers* which is considered "[b]y far the best known and most sustained colonial argument for an impartial press." Stephen Botein, *Printers and the American Revolution, printed in The Press and the American Revolution* 20 (Bernard Bailyn & John B. Hench eds., 1980). Franklin's *Apology* contended that "Printers are educated in the Belief that when Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick." *An Apology for Printers, supra.*[24] Thus, America's first sustained defense of freedom of expression, and of the very notion of a "marketplace of ideas," came in response to an attack on commercial speech.[25]

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[24] This echoed the sentiment in the libertarian *Cato's Letters* that "Whilst all Opinions are equally indulged, and all Parties equally allowed to speak their Minds, the Truth will come out." Trenchard & Gordon, 3 *Cato's Letters* 295 (1733).

[25] In addition, one of the major precipitating events of the American Revolution also involved a defense of commercial messages. The Stamp Act of 1765 taxed each newspaper—and imposed an additional two-shilling tax on each advertisement. "This was a heavy tax in proportion to the value of the item being taxed," and galvanized the colonial press against the British government. John Lofton, *The Press as Guardian of the First Amendment* 2 (1980). The opposition of newspapers to the Stamp Act of 1765 was in large part, if not primarily, based on their concern that it encroached on the freedom of expression. Arthur M. Schlesinger, *Prelude to Independence: The Newspaper War on Britain 1764-1776* 70-82 (1966).

The First Amendment came from this background. Its authors were accustomed to the idea that commercial speech had important practical value. Their regard for free expression had been critically shaped by the ideas embodied in Franklin's defense of a commercial handbill. Thus, the First Amendment's categorical protection for freedom of expression must be understood to have meant what it said: full protection extends to truthful commercial discourse.[26]

C. The Results of This Court's Commercial Speech Decisions Generally Have Protected Truthful Commercial Messages.

Granting equal protection to commercial speech is not inconsistent with this Court's jurisprudence. Since *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council,* this Court has recognized that "the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system" and to "the formation of intelligent decisions as to how that system ought to be regulated." 425 U.S. 748, 765 (1976).

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[26] Of course, the government may ban the dissemination of false or misleading commercial messages. *See, e.g., Friedman v. Rogers,* 440 U.S. 1 (1979). This may be true either because, by definition, such messages are excluded from the First Amendment or because the government is always presumed to have a compelling interest in preventing deception. In any event, such a view comports with the oriignal understanding of the First Amendment, which was adopted against the background of a venerable common-law tradition prohibiting commercial misrepresentation. See William Blackstone, 3 *Commentaries on the Laws of England* 431 (1768); Joseph Story, *Equity Jurisprudence* § 191 (1836); William F. Walsh, *A History of Anglo-American Law* 328-29 (1932) (tracing development of action of deceit from mid-fourteenth century).

Moreover, the decision observed that "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.

Although the Court has said that commercial speech is entitled to less protection than noncommercial speech and has applied the "balancing" test established in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), it has, in almost every case, decided its cases in a manner consistent with a grant of full First Amendment protection to truthful advertising of lawful products. This Court's commercial speech decisions have generally upheld restrictions only where consumers were likely to be misled in the absence of regulation, or where illegal or relatively unique products or services were being advertised.[27] On the other hand, the Court has struck down numerous regulations on commercial communications which were designed to advance other purported government interests.[28] Accordingly,

[27] *See, e.g., Friedman*, 440 U.S. at 13 (ban on optometrists' use of trade names justified by "significant possibility" of mislead[ing] the public."); *Zauderer v. Off. of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (notice of client responsibility for certain costs required in contingent fee messages because "reasonably related to the State's interest in preventing deception of consumers") (footnote omitted); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978) (ban on attorney solicitation permitted in situation "inherently conducive to overreaching and other forms of misconduct").

[28] *See, e.g., Discovery Network*, 113 S. Ct. at 1511 (rejecting contention that "low value" of commercial speech justified ban on distribution of commercial newsracks to promote safety and esthetics); *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993) (striking ban on personal solicitation by certified public accountants and recognizing that "the general rule is that the speaker and the audience, not the government, assess the value of the information presented"); *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990) (plurality opinion) (overturning attorney censure and reaffirming "the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information");

equalizing the protection afforded to commercial speech and noncommercial speech would not require substantial modification of governmental policies previously approved by the Court.[29]

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 479-80 (1988) (truthful, non-deceptive letters sent to individuals known to face particular legal problems were constitutionally protected); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 80 (1983) (Rehnquist, J., concurring) (striking down ban on truthful unsolicited advertisements); *In re R.M.J.*, 455 U.S. 191 (1982) (rule limiting dissemination of truthful advertising violated First Amendment); *Central Hudson*, 447 U.S. at 571-72 (regulation restricting non-deceptive advertisements promoting use of electricity violated First Amendment); *Bates v. State Bar*, 433 U.S. 350, 384 (1977) (truthful attorney advertising constitutionally protected); *Cary v. Population Servs. Int'l.*, 431 U.S. 678, 701-02 (1977) (restriction on contraceptives ads invalidated because it did more than limit misleading or deceptive speech); *Linmark*, 431 U.S. at 98 (striking ordinance prohibiting for-sale signs because it inhibited free flow of truthful information); *Bigelow v. Virginia*, 421 U.S. 809, 828-29 (1975) (barring prosecution for running non-deceptive advertisement for legal service).

[29] The Court has found against a commercial speaker disseminating a truthful and non-misleading message in only three cases. The first, *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986), involved a regulation limiting the advertising of casino gambling—an activity long subjected to special regulation by the state—to residents of Puerto Rico. The second, *Board of Trustees v. Fox*, 492 U.S. 469 (1989), is best understood, and should have been analyzed, as a right of access case involving a rule of general applicability affecting many business activities in addition to commercial speech. *See Heffron v. International Society of Krishna Consciousness*, 452 U.S. 640 (1981) (state fair may require that sale or distribution of any merchandise on state fair grounds be licensed). The third, *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), involved advertising messages about a service—lotteries—that are traditionally subject to intensive state regulation. Moreover, the type of services that the broadcaster in *Edge Broadcasting* sought to advertise was illegal in the state in which the broadcaster was located.

D. Distinguishing Between Commercial and Noncommercial Messages Is Often a Difficult, if Not Futile, Exercise.

This Court has made clear "that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. Speech likewise is protected even though it is carried in a form that is 'sold' for profit . . . , and even though it may involve a solicitation to purchase or otherwise pay or contribute money." *Virginia Pharmacy*, 425 U.S. at 761-62 (citations omitted) (giving examples of books, motion pictures, and religious literature).[30] On the other hand, this Court has classified as "commercial" those messages that propose a commercial transaction or that "relate[] solely to the economic interests of [the] audience," *Central Hudson*, 447 U.S. at 561. The distinction between these categories, however, is elusive at best. The difficulty of differentiating between commercial and noncommercial speech provides additional support for treating them equally.

It is often difficult "in the first instance [to] decid[e] whether the proposed speech is commercial or noncommercial. In individual cases, this distinction is anything but clear." *Metromedia*, 453 U.S. at 536 (Brennan, J., concurring). Recently, in *Discovery Network*, the Court acknowledged "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." 113 S. Ct. at 1511. This problem exists not only in seeking to distinguish between "newspapers" and "commercial handbills," as was the issue in *Discovery Network*, but also in seeking to determine whether an advertisement is "proposing a commercial transaction" or expressing a political opinion.[31]

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[30] *See also New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) ("To avoid placing such a handicap upon the freedoms of expression, [statements] do not forfeit [First Amendment] protection because they were published in the form of a paid advertisement.").

[31] For example, as Justice Brennan famously posed the problem, it is essentially impossible to distinguish among billboards that say "Visit Joe's Ice Cream Shoppe," "Because Joe thinks that dairy products are good for you, please shop at Joe's Shoppe," and "Joe says to support dairy price supports: they mean lower prices for you at his Shoppe." Metromedia, 453 U.S. at 538-539. *See also* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 638-48 (1990) (listing numerous existing advetrising examples and judicial decisions which demonstrate the difficulty in defining commercial speech).

Moreover, the Court's highly artificial and forced distinction between commercial and noncommercial speech encourages "those who seek to convey commercial messages [to] engage in the most imaginative of exercises to place themselves within the safe haven for noncommercial speech, while at the same time conveying their commercial message." *Metromedia*, 453 U.S. at 540. Conversely, a government may attempt to discriminate against a particular viewpoint by regulating its preferred mode of commercial dissemination and justifying that ordinance as merely a restriction on commercial speech. *Discovery Network*, 113 S. Ct. at 1513-14 n.19.[32]

Indeed, the examples described above demonstrate "the absurdity of treating all commercial speech as less valuable than all noncommercial speech." *Id.* at 1520 (Blackmun, J., concurring). It is a futile enterprise with dangerous consequences that should be abandoned.

CONCLUSION

For the reasons set forth herein, *amici* submit that the City of Ladue's ordinance is unconstitutionally content-based. Accordingly, the Court should affirm the Eighth Circuit's decision, not on the grounds that the ordinance elevates commercial speech over noncommercial speech, but based on the illegitimate distinctions the ordinance makes between protected communications. In the proc-

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[32] *See also Metromedia*, 453 U.S. at 536-37 (Brennan, J., concurring) (allowing a government to determine whether speech is commercial or noncommercial "entail[s] a substantial exercise of discretion by a city's official" and thus "presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech").

ess, the Court should make clear that commercial speech is to be accorded the same level of constitutional protection as noncommercial speech.

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